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No. _____

Supreme Court, U.S.
FILED
JULY 7
1992

In The

Supreme Court of the United States

October Term, 1992

SABINE CONSOLIDATED, INC. AND
JOSEPH TANTILLO,

Petitioners,

vs.

THE STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR CERTIORARI IN CRIMINAL CASE

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QUESTIONS PRESENTED

1. Whether the Federal Occupational Safety and Health Act (OSHA) of 1970 preempts the criminal prosecution of the Petitioners, by the State of Texas, under the State's criminally negligent homicide statute when, as in this case, the statute is not being utilized as a general criminal statute but as an enforcement provision for the Texas Occupational Safety Act (TOSA) which is expressly preempted by OSHA?

2. Whether the Texas Occupational Safety Act (TOSA), in the absence of administrative rules and regulations, can be utilized as an element of a state criminal offense when the civil statute does not provide ascertainable standards of conduct as required by the Fifth and Fourteenth Amendments to the United States Constitution?

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To The Texas Court Of Criminal Appeals

PETITION FOR CERTIORARI IN CRIMINAL CASE

OPINIONS BELOW

The opinion of the Court of Appeals, Third District of Texas, below issued on May 4, 1988 was withdrawn and not reported. The substituted opinion of the Court of Appeals below issued on August 31, 1988 (Appendix A) is reported in 756 S.W.2d 865. The opinion of the Texas Court of Criminal Appeals below on State's Petition for Discretionary Review issued on February 13, 1991 (Appendix B) is reported in 806 S.W.2d 553. The opinion of the Court of Appeals, Third District of Texas, below issued on August 28, 1991 (Appendix C) on Remand from

the Court of Criminal Appeals is reported in 816 S.W.2d 784.

JURISDICTION

On February 13, 1991 the Texas Court of Criminal Appeals, on the State's Petition for Discretionary Review, reversed the ruling of the Court of Appeals, Third District, and remanded the case to the Court of Appeals for further consideration. On August 28, 1991 the Court of Appeals, Third District, issued its opinion "On Remand" and affirmed the Trial Court's Judgments. On November 13, 1991 the Court of Appeals overruled the Petitioners' Motion for Rehearing. The Petitioners filed Petitions for Discretionary Review to the Texas Court of Criminal Appeals which were refused on April 8, 1992; thus, making the judgments of the Trial Court final.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 and Rule 10.1.(b) and (c), Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. FEDERAL LAW

1. United States Constitution, Art. VI, CL. 2 (Supremecy clause) which provides:

> [2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be

made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment, United States Constitution, provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 29 U.S.C. Section 651 provides:

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

* * *

5. 29 U.S.C. Section 653(4) provides:

(4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

6. 29 U.S.C. Section 654 provides:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of

employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own action and conduct.

7. 29 U.S.C. Section 666(e) provides:

Any employer who willfully violates any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

8. 29 U.S.C. Section 667(a) and (b) provides:

(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Any State which, at any time, desires to assume responsibility for development and

> enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

B. STATE LAW

9. The Statute under which the Petitioners were convicted is V.T.C.A., Penal Code Section 19.07 which provides:

> (a) A person commits an offense if he causes the death of an individual by criminal negligence.
>
> (b) An offense under this section is a Class A misdemeanor.

10. The culpable mental state of criminal negligence is defined in V.T.C.A., Penal Code Section 6.03(d) which states:

> (d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances and viewed from the actor's standpoint.

11. When the culpable mental state of criminal negligence is alleged, the State must comply with Vernon's Ann. C.C.P., Art. 21.15, which states:

> Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessnesss or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

12. V.T.C.A., Penal Code Section 1.03(a) provides:

> (a) Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute.

13. V.T.C.A., Penal Code Section 6.01 relates to "Omissions" and provides:

> (a) A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession.
>
> * * *
>
> (c) A person who omits to perform an act does not commit an offense unless a statute provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

14. Vernon's Ann. Civ. St., Art. 5182a, Sec. 3, (TOSA) is the Statute which the State alleged, pursuant to Sec. 6.01(c), infra, provided the duty for the Petitioners to act, thus allowing the Section 19.07, supra, prosecution, and provides:

> Sec. 3. Every employer shall furnish and maintain employment and a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain, and use such methods, processes, devices, and safeguards, including methods of sanitation and hygiene, as are reasonably necessary to protect the life, health, and safety of such employees, and shall do every other thing reasonably necessary to render safe such employment and place of employment.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS AND TRIAL COURT PROCEEDINGS

On September 10, 1985, two of the Petitioners' employees were working in an excavation, located in Travis County, Texas. One of the walls of the excavation collapsed and the employees were killed.

On the 21st day of November, 1985, the Travis County Grand Jury returned indictments against Sabine Consolidated, Inc. [Cause No. 259,257] and the corporation's president, Joseph Tantillo [Cause No. 259,250] alleging the offense of criminally negligent homicide. On March 31, 1986 the Petitioners filed written pretrial motions in this cause, pursuant to Vernon's Ann. C.C.P.,

Arts. 27.02 et seq. and 28.01 et seq. Several of the Petitioners' written motions raised Federal questions which the Petitioners are now asking this Honorable Court to review. On the 3rd day of September, 1986 pretrial hearings were held concerning the Petitioners' motions. [R. 23]. The State then announced that it was filing complaints and informations against the Petitioners and would proceed upon the complaints and informations as opposed to the indictments. The complaints and informations, which were based upon the same conduct that gave rise to the indictments, were filed as Cause No. 269,530 against Sabine Consolidated, Inc. and Cause No. 269,533 against Joseph Tantillo. All papers from the files of the indicted cases were transferred to the court files of the cases based upon the complaints and informations [R. 64, 75-77]. The pretrial hearing continued on September 4, 1986 [R. 71]. On February 13, 1987, after the trial court had denied all of the Petitioners' motions to dismiss and quash the charging instruments, the Petitioners entered into plea agreements whereby they would be allowed to appeal the trial court's rulings on the pretrial motions. [R. 135-136 and 142]. Sabine Consolidated, Inc. plead nolo contendere, pursuant to the plea agreement [R. 128]. The trial court found the Petitioner guilty and the punishment was assessed at a fine of $10,000 [R. 136]. Petitioner Tantillo plead nolo contendere pursuant to the plea agreement [R. 138]. The trial court found the Petitioner guilty and the punishment was assessed at a fine of $2,000.00 and confinement for 180 days, probated for twelve months [R. 141].

B. STATE APPELLATE COURT PROCEEDINGS

The Petitioners took direct appeals of their convictions to the Court of Appeals, Third District of Texas, and after presentation of briefs and oral arguments on all Federal Questions herein raised, the Court of Appeals reversed and rendered a judgment of acquittal in a published opinion, on May 4, 1988, ruling that OSHA preempted this state prosecution and ordered judgments of acquittal to be entered. The Court of Appeals did not address the Petitioners' additional points of error. The State filed a Motion for Rehearing on May 15, 1988. On August 31, 1988, the Court of Appeals withdrew its May 4th opinion and substituted a new opinion which continued to hold that the judgments of acquittal were proper as OSHA preempted these particular criminal prosecutions. On September 30, 1988 the State filed a Petition for Discretionary Review which was granted by the Texas Court of Criminal Appeals. On February 13, 1991 the Texas Court of Criminal Appeals issued a published opinion which reversed the holding of the Court of Appeals and remanded this case to the Court of Appeals for consideration of the Petitioners' remaining points of error. The Petitioners filed Motions for Rehearing on February 28, 1991 and the same were denied on April 3, 1991. On May 1, 1991, the Court of Appeals invited the parties to submit Letter Briefs in order to update the original briefs which had been filed in 1987. The Petitioners filed Letter Briefs on May 29, 1991. On August 28, 1991, the Court of Appeals issued an opinion overruling all of Petitioners' points of error, including the Petitioners, assertion that Art. 5182a, supra, was unconstitutionally vague, and affirming the convictions. On September 23,

1991 the Petitioners filed Motions for Rehearing in the Court of Appeals and the same were overruled on November 13, 1991. On December 9, 1991 the Petitioners filed Motions for Extension of Time to File their Petitions for Discretionary Review and the Texas Court of Criminal Appeals extended the filing date to January 13, 1992. On April 8, 1992 the Texas Court of Criminal Appeals refused the Petitions for Discretionary Review making the rulings on all Federal Questions raised final in State Court.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW, BY RULING THAT OSHA DOES NOT PREEMPT THIS STATE CRIMINAL PROSECUTION, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Petitioners filed written pretrial motions in the trial court on March 31, 1986, styled "Motion to Quash the Indictment Due to Lack of Jurisdiction" and corresponding memorandum styled "Memorandum in Support of Defendant's Motion to Quash the Indictment Due to Lack of Jurisdiction". The Motions set forth that the Petitioners were charged with the offense of criminally negligent homicide under V.T.C.A., Penal Code, Sec. 19.07 and that in order to satisfy the specific pleading requirements of Vernon's Ann. C.C.P., Art. 21.15, the State had alleged that the Petitioners failed to properly slope and adequately shore the walls of an excavation and this "issue" was controlled by OSHA "standards" promulgated under 29 U.S.C. Sec. 655. As the indictment alleged

that "omissions" were the *conduct* giving rise to the offense, the Petitioners pointed out that the State was required, by V.T.C.A., Penal Code Section 6.01(c), to rely upon a *statute* which made the "omission" an offense or which created a duty to perform the act. Therefore, the State has relied upon the Texas Occupational Safety Act (TOSA) and tracked its general duty clause which is found at Vernon's Ann. Civ. St. Art. 5182a, Sec. 3, and then specifically alleged that the Petitioners failed to adequately shore and properly slope the walls of the excavation.

The Petitioners' motions further alleged that the Federal Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. Section 651 et seq., preempted the States from exercising jurisdiction over occupational safety and health "issues" in areas where OSHA had promulgated "standards". 29 U.S.C. Section 667. The Petitioners directed the trial court to the fact that OSHA had promulgated, in accordance with 29 U.S.C. Section 655, safety "standards" for excavation, trenching and shoring which are found at 29 C.F.R. Sections 1926.650-1926.653. These "standards" specifically established the requirements for adequately shoring walls of excavations and the requirements for properly sloping the walls of excavations and these "standards" specifically governed the conduct for which the Petitioners were being prosecuted by the State; therefore, the State did not have jurisdiction to prosecute the Petitioners under Section 19.07, supra, for violating TOSA as the OSHA "standards" specifically applied.

Following the trial court's denial of the Petitioners' Motions to Quash Due to Lack of Jurisdiction, the Petitioners, raised the issue of OSHA preemption on direct

appeal to the Court of Appeals, Third District of Texas. The Court of Appeals ruled, that under the facts of this case, OSHA did preempt the State prosecution of the Petitioners. The Court stated at 756 S.W.2d 865, 868 (Tex. App. – Austin, 1988):

> We read Section 667(a) to mean that the states are free to establish and enforce any laws relating to worker safety so long as those laws or actions do not entail establishing or enforcing standards affecting occupational safety issues that are addressed by OSHA standards. We are not alone in this interpretation. "[Section 667(a)] has been consistently interpreted by OSHA and the courts to bar the exercise of state jurisdiction over issues addressed by an OSHA standard, even where the state law may arguably be more stringent or where OSHA has not explicitly addressed a provision." New Jersey State Chamber of Commerce v. Hughey, 600 F.Supp. 606 (D.N.J. 1985).
>
> Based on these sections of OSHA, we find that Congress intended by implication to absolutely preempt the field of workplace safety regulation. We hold that Section 667(a) absolutely preempts all state regulation of workplace safety where such regulation would effectively establish state safety standards in areas governed by OSHA.

The Court of Appeals noted that its preemption ruling was based upon Texas' statutory scheme which would not allow the prosecution of conduct by "omission" without the required statutory duty to act. The Court of Appeals stated at page 868:

> [3] While the criminal actions here do not literally purport to establish worker safety standards, *the criminal charges were based on a failure to perform a duty found in a statute which does prescribe safety standards.* The practical effect of such charges is to set up a body of state law affecting workplace safety issues already governed by federal standards promulgated pursuant to Section 655 of OSHA. Specifically, the effect is to establish local standards governing the digging of trenches, a subject regulated in detail by 29 C.F.R. Sections 1926.650-1926.653, the OSHA standards for trenching promulgated pursuant to Section 655. (Emphasis added).

Therefore, the Court of Appeals did not hold that OSHA preempted State *general* criminal laws in the workplace; but, only that the State of Texas could not utilize V.T.C.A., Penal Code Section 19.07 as a means of enforcing TOSA over workplace "issues" where OSHA has promulgated Section 655 "standards".

Following the reversal of the Petitioners' conviction by the Court of Appeals, the Texas Court of Criminal Appeals, on the State's Petition for Discretionary Review, reversed the Court of Appeals holding and ruled that OSHA did not preempt the State's prosecution of the Petitioners. While the Court of Criminal Appeals recognized that there could not be a Section 19.07, supra, prosecution of the Petitioners, under the facts of this case, without the "duty" provided by TOSA, the Court asserted that OSHA did not preempt state criminal law and then ignored the fact that OSHA, expressly preempted TOSA, which provided the necessary "duty" element of the offense, where Section 655 standards have

been promulgated. The Court stated at 806 S.W.2d 553, 557 (Tex. Cr. App. 1991):

> *. . . The criminally negligent homicide statute is not a standard as defined by OSHA, even though, as in this case, it involves a duty. Tex. Penal Code Ann. Section 19.07 does not set conditions or establish practices or processes to ensure a safe workplace. Surely, it may foster the development of standards to do just that . . .* (Emphasis added).

The Court of Criminal Appeals' failure to acknowledge the affect of OSHA's preemption of TOSA in this prosecution is further illustrated at page 558 of the Court's opinion where it states:

> The purpose of state criminal laws and criminally negligent homicide in particular, is not to set standards for workplace safety. *The purpose is to punish one for an illegal act as defined by the penal code, whether that act be done in the workplace or elsewhere.* OSHA is not designed to deal with state criminal offenses. Simply because a state criminal law may incidentally concern an area controlled by federal law, this fact alone does not make the state law impermissible. Therefore, state criminal laws are not preempted by federal law aimed at safeguarding the workplace. (Emphasis added).

While Section 19.07, supra, is not aimed directly at the workplace, TOSA was enacted specifically to govern the workplace. The State of Texas could not proceed under TOSA to prosecute the Petitioners because TOSA was preempted by OSHA; therefore, the State has utilized Section 19.07, supra, as an enforcement arm of TOSA that will allow the state to enforce this occupational safety

and health "issue" without having a plan approved under Sec. 667(b), supra. As TOSA is preempted by OSHA under the facts of this case, TOSA cannot be said to provide the "duty" required by V.T.C.A., Penal Code Section 6.01(c) necessary for the prosecution of "omissions" and the State of Texas cannot rely upon the OSHA "standards" to meet the pleading requirements of Vernon's Ann. C.C.P., Art. 21.15. Therefore, this State prosecution of the Petitioners has been preempted by OSHA.

II. THE COURT BELOW, BY RULING THAT OSHA DOES NOT PREEMPT THIS STATE CRIMINAL PROSECUTION, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT AND OF UNITED STATES COURTS OF APPEAL

The Court of Criminal Appeals below supported its opinion, concerning OSHA preemption, by citing case law from other states wherein Courts have ruled that OSHA does not preempt the state's general criminal law. The Court below stated at page 559-560 of its opinion:

> Several other states have addressed this same issue, all of them concluding that state criminal laws were not preempted by OSHA. Chicago Magnet Wire Corp., supra; People v. Hegedus, supra; People v. Pymm, 76 N.Y.2d 511, 563 N.E.2d 1, 561 N.Y.S.2d 687 (1990); State ex rel. Cornellier v. Black, 144 Wis.2d 745, 425 N.W.2d 21 (1988); see also People v. Brom, 185 Ill. App.3d 411, 133 Ill.Dec. 534, 541 N.E.2d 745 (1989) and Commonwealth v. Morris, 394 Pa.Super. 185, 575 A.2d 582 (1990).

While the first four of these cases have addressed the question of whether state *general* criminal law is pre-empted by OSHA and determined that it is not – none of the cases have addressed the issue of whether *general* state criminal law can be utilized as the enforcement arm of a State safety statute which is expressly preempted by OSHA. However, in *Thornock v. State*, 745 P.2d 324, 327 (Mont. 1987) the Montana Supreme Court stated:

> [1-3] The tort of negligence arises when *one has a duty recognized by law,* he breaches that *duty,* the breach of the *duty* serves as a legal cause of another's injury, and that injury is an actual loss or damage. Roy v. Neibauer (Mont. 1981), 623 P.2d 555, 556, 38 St.Rep. 173, 174; Pretty on Top v. City of Hardin (1979), 182 Mont. 311, 315, 597 P.2d 58, 60. *If no duty exists there can be no negligence.* Ambrogini v. Todd (1982), 197 Mont. 111, 118, 642 P.2d 1013, 1017, citing Prosser on the Law of torts Section 30; Green v. Hagele (1979), 182 Mont. 155, 158, 595 P.2d 1159, 1161. *No duty on the part of the State lies here because of the federal government's usurpation of the Montana Safety Act when Congress passed OSHA in 1970.* Congress declared its role in 29 U.S.C. Section 651 as being "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . . " by creating occupational health and safety standards, establishing an enforcement program, and providing appropriate reporting procedures. Subsection 11 of 29 U.S.C. Section 651(b) allows states to assume administration of workers, safety programs if they submit plans approved by the Department of Labor. (Emphasis added).

The Court concluded its opinion at page 330, by stating:

> After a careful review of the record and a weighing of the arguments we agree that the *State's duty to inspect had been superseded by the federal act*. Thus, the fact that the State had not inspected the sawmill at which Thornock was injured does not make the State negligent *for the most important element of negligence -duty- had been assumed by the federal government* . . . (Emphasis added).

In *McElory v. SOS International, Inc.*, 730 F.Supp. 803, 809 (N.D. Ill. 1989) the Court discussed the *Thornock* case as follows:

> The Montana Supreme Court's decision in Thornock v. State, 229 Mont. 67, 745 P.2d 324 (1987) is more troubling. The plaintiff in Thornock was injured while attempting to unjam a block of wood that had stalled a conveyor belt at a lumber company. He claimed that the defendant, the state of Montana, had breached a duty of inspecting his worksite arising under a Montana safety standard requiring state inspection of hazardous workplaces and machinery. The court held that an OSHA regulation setting federal safety standards for sawmills and adopting specific construction, operation and maintenance standards for conveyors preempted the Montana standard. *However, because the Thornock case involved a specific safety standard, rather than preemption of state tort law in general, as here, the case for preemption in Thornock was much stronger under 29 U.S.C. Section 667(a) and (b) than here.* See discussion, supra. Moreover, this court finds the facts and analysis presented in Chicago

> Magnet Wire more closely apposite. (Emphasis added).

In addition, *Thornock* was cited as authority in *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 678 (7th Cir. 1990) and has been cited in numerous other cases.

The decision of the Texas Court of Criminal Appeals in the present case conflicts with the decision of the Montana Supreme Court in *Thornock*, supra. The Montana Supreme Court found that a necessary element in the tort of negligence is "duty" and that since the State's "duty" had been preempted by OSHA standards – there could not be a state tort suit under the facts presented. In the present case however, the Texas Court of Criminal Appeals has found that the "duty" provided by TOSA is a necessary element of the state's criminally negligent homicide prosecution and has also found that there are specific OSHA standards covering the Petitioners' conduct which preempts TOSA. However, the Texas Court allows the criminal prosecutions of the Petitioners' despite the fact that a necessary element (duty) of the offense has been preempted by OSHA. Just as the *Thornock* court did not involve "preemption of State tort law in general", the present Texas case does not involve the preemption of state criminal law in general and the Texas Court of Criminal Appeals should have found the prosecution of the Petitioners to be preempted by OSHA under the particular facts and circumstances of this case which would be consistent with *Thornock*.

Furthermore, the Court of Criminal Appeals below ruled that 29 U.S.C. Sec. 653(b)(4) does not "reserve only

private rights", but allows for State criminal prosecution. This holding is in conflict with *Frohlick Crane Service, Inc. v. OSCHR*, 521 F.2d 628, 631 (10th Cir. 1975) and *Jeter v. St. Regis Paper Co.*, 507 F.2d 975 (5th Cir. 1975). This is an important federal question which should be settled by this Court.

III. THE DECISION OF THE COURT BELOW UPHOLDING THE CONSTITUTIONALITY OF ART. 5182A, SEC. 3 OF TOSA CONFLICTS WITH THIS COURT'S HOLDINGS IN *SMITH V. UNITED STATES*, 431 U.S. 291 (1977) AND *PARKER V. LEVY*, 417 U.S. 733 (1974)

The Petitioners filed written pretrial motions in the trial court in which they alleged that Vernon's Ann. Civ. St., Art. 5182a, Sec. 3 (TOSA) was unconstitutionally vague in that it failed to provide ascertainable standards of conduct. The motions alleged that the Petitioners were charged with the offense of criminally negligent homicide under V.T.C.A., Penal Code Section 19.07 and as the culpable mental state alleged is criminal negligence, Vernon's Ann. C.C.P. Art. 21.15 required that the indictment allege the particular acts relied upon to constitute criminal negligence. The state alleged the failure to act – "omissions" – as being the criminally negligent conduct. The Petitioners stated that V.T.C.A., Penal Code Section 6.01(c) provided that an "omission" is not an offense unless a statute makes it an offense or otherwise provides that the Petitioners had a duty to act. As there is not a statute which makes the "omissions" alleged in the indictment an offense, the State relied upon Vernon's Ann. Civ. St. Art. 5182a, Sec. 3 as a statute creating a duty

for the Petitioner to perform the acts alleged in the indictments. The specifically omitted acts alleged in the charging instrument are covered by OSHA "standards".

The Petitioners asserted that Art. 5182a, Sec. 3, supra, when applied in the criminal prosecution, was void for vagueness as it failed to provide any ascertainable standards of conduct and cited as authority *Cotton v. State*, 686 S.W.2d 140 (Tex. Cr. App. 1985), and the authorities set forth therein. The Petitioners argued that Art. 5182a, Sec. 3, supra, did not give them notice as to what acts the statute requires or forbids and that the statute was vague and provided no ascertainable standards of conduct and a man of common intelligence must necessarily guess as to whether his contemplated actions were in violation of the statute. The Petitioners could not reasonably foresee that their decisions concerning the manner of sloping and shoring the walls of the excavation would be in violation of the statute, as the statute is simply a catch-all standard which can conceivably, after the fact, allow any conduct to be brought within its proscriptions.

The trial court denied the Petitioners' motions and this federal question was raised on direct appeal to the Court of Appeals, Third District of Texas. The Petitioners asserted that Article 5182a, Sec. 3, supra, did not give them notice as to what acts the statute required or forbade, nor was it intended by the Legislature to give such notice. The Petitioners asserted that when the statute was enacted in 1967, the Legislature, realizing that Art. 5182a, Sec. 3 gave no guidance to employers concerning safety standards, enacted Art. 5182a, Sec. 8 which authorized the making of "reasonable rules and standards not inconsistent with this Act for the prevention of accidents and

occupational injuries in every employment or place of employment . . . " Furthermore, Art. 5182a, Sec. 3(b), required employers to comply with the rules and standards created under the Act. The Petitioners pointed out that the standards and rules were not created because Art. 5182a was preempted by the Federal Occupational Safety and Health Act of 1970 and that Art. 5182a now exists only as an arm of the Federal Occupational Safety and Health Act. *See*, Art. 5182a, Sec. 4. Therefore, the Petitioners asserted that Art. 5182a could not be used as the basis for criminal liability as it clearly did not provide any ascertainable standards of conduct. The Court of Appeals did not address this Federal Question in its opinion published on August 31, 1988 as the court's ruling upon the OSHA preemption issue raised by the Petitioners made consideration of this question unnecessary.

Following Remand by the Texas Court of Criminal Appeals, the Court of Appeals overruled the point of error by stating at 816 S.W.2d 784, 786 (Tex. App. – Austin, 1991):

> [3] We conclude that the general duty imposed by TOSA is sufficient to give an employer of ordinary intelligence notice that the employer owes a duty to ensure that employees working in an excavation are reasonably safe. *This general duty necessarily entails shoring and sloping appropriate to the excavation involved.* We further conclude that TOSA does not encourage erratic and arbitrary arrests and convictions in that it provides a definite framework within which to determine if conduct is punishable.

* * *

> Appellant cannot reasonably have believed that they had complied with their duty to provide their employees a safe and healthful workplace when they failed to *adequately slope and shore the trench in this case*. We overrule this point. (Emphasis added).

The Petitioners filed a Petition for Discretionary Review to the Texas Court of Criminal Appeals and requested this federal question be reviewed. The Court of Criminal Appeals refused Discretionary Review on April 8, 1992, making the decision of the Court of Appeals final.

II.

The Court of Appeals acknowledged that Art. 5182a, Sec. 3, supra, is a general duty statute which does not proscribe or require specific acts. However, in order to uphold the constitutionality of the statute, the Court stated at 816 S.W.2d 784, 786 (Tex. App. – Austin, 1991):

> "In this regard, we note that the question of whether an employer has breached his duty under TOSA is one for the fact finder. A statute is not void merely because culpability must be determined on a de facto basis . . . "

The Court supported this statement by citing "*Smith v. United States*, 431 U.S. 291, 308-09 (1977) (statute prohibiting distribution of obscene materials through the mail not unconstitutionally vague merely because different fact finders might reach different conclusions as to whether the same material is obscene)". In the Petitioners, Motions for Rehearing the Petitioners, directed the Court of Appeals' attention to the fact that it had incorrectly

relied upon, and misinterpreted, the holding of *Smith*, supra. While the Supreme Court did refer to "the possibility that different juries might reach different conclusions", the Supreme Court made clear that this is allowable only because the statute, legislatively and by court construction, contains ascertainable standards of conduct which guide the jury and allow for review of jury verdicts. The Court of Appeals' ruling below concerning the constitutionality of Art. 5182a, Sec. 3, supra, is contrary to the Supreme Court's ruling in *Smith v. United States*, supra, in that there is no previous Court construction of Article 5182a, supra, which limit the reach of the statute by providing "Substantive limitations" and Art. 5182a, Sec. 3 is unconstitutional as it fails to provide ascertainable standards of conduct required by the Fifth and Fourteenth Amendments to the United States Constitution.

III.

The Court of Appeals stated at 816 S.W.2d 787:

> Further, a statute is not unconstitutionally vague merely because it involves only a general standard. *See Peterson v. Goodwin*, 512 F.2d 479 (5th Cir.), cert. denied, 423 U.S. 931 (1975)(officer charged with conduct prejudicial to good order and discipline in the armed forces cannot actually have doubted that his sale of heroin to fellow airmen was an offense);

Peterson, supra, does not support the constitutionality of statutes which fail to provide ascertainable standards of conduct, but supports the Petitioners' arguments of the unconstitutionality of Article 5182a, Sec. 3. *Peterson* is of

no value, as precedent, in the constitutional vagueness argument without reviewing *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 439 (1974) which the *Peterson* Court specifically relied upon.

The Court, in *Parker*, discussed in detail the history of military justice and distinguished military law from law governing the civilian population. The Court pointed out that while the Uniform Code of Military Justice has a "broader sweep" – it requires that its provisions be explained to enlisted members on active duty and that the complete text of the Code "be made available to any person on active duty, upon his request, for his personal examination". The *Parker* court further pointed out that the scope of the Military Code had been limited by construction given to it by the Military Appeals Courts and by the Manual for Courts-Martial. The *Parker* court stated at page 754:

> The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the Articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover . . .

In short, *Parker*, supra, does not stand for the proposition that general statutes are not unconstitutionally vague, but stands for the proposition that statutes which are vague can pass constitutional muster if the statute is limited by Court construction and administrative regulation. Therefore, the ruling of the Court of Appeals that Art. 5182a is constitutional, in the absence of Court construction or administrative regulations, is contrary to the

Supreme Court case of *Parker v. Levy*, supra, and is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

The Federal Questions herein raised are of national significance in that there is a recurring question of the role the State's are allowed to play in the enforcement of occupational safety and health issues in light of the pre-emptive language of OSHA. If the States are allowed to enforce occupational safety and health plans, which have not been approved by the Secretary of Labor, by labeling them as state criminal laws or, as in this case, by utilizing a criminal law to enforce the State safety act which has been expressly preempted by OSHA; then, the purpose of OSHA in allowing State's to regain jurisdiction by submitting plans and having them approved by the Secretary of Labor in accordance with 29 U.S.C. Sec. 667(b) will be frustrated in that the State's will have no incentive for seeking to have such plans approved. The Petitioners respectfully request that this Petition for Writ of Certiorari be Granted.

Respectfully submitted,

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IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

ON MOTIONS FOR REHEARING

NO. 3-87-051-CR

SABINE CONSOLIDATED, INC.,

APPELLANT

vs.

THE STATE OF TEXAS,

APPELLEE

NO. 3-87-055-CR

JOE TANTILLO,

APPELLANT

vs.

THE STATE OF TEXAS,

APPELLEE

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, NOS. 269,530 AND 269,532, HONORABLE LESLIE D. TAYLOR, JUDGE

The prior opinion handed down by this Court on May 4, 1988, is withdrawn and the following is substituted therefor.

Both appellants were charged with criminally negligent homicide and pleaded nolo contendere to the charge after argument on pretrial motions. The trial court accepted the pleas and found both appellants guilty. We will reverse the judgments of the trial court and render judgments of acquittal in both causes.

BACKGROUND

Appellant Tantillo was the president of appellant Sabine Consolidated, Inc. (Sabine). In September 1985, two construction workers employed by Sabine were killed when the trench they were working in collapsed. Two months later, the Travis County grand jury indicted both Sabine and Tantillo for criminally negligent homicide. The Travis County Attorney followed those indictments with complaints and informations based on the same charge and conduct, and the State chose to proceed on the latter basis.

Appellants were charged under Tex. Pen. Code Ann. § 19.07 (1974). which provides that a person commits an offense if he causes the death of an individual by criminal negligence.[1] Each information stated that [appellant] "fail[ed] to furnish and maintain a place of employment which was reasonably safe and healthful for [the

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[1] A corporation may be considered a "person" for purposes of this statute. Vaughn & Sons v. State, 737 S.W.2d 805 (Tex. Crim. App. 1987).

deceased and] fail[ed] to install and maintain and use such methods and processes and devices and safeguards as were reasonably necessary to protect the life and health and safety of [deceased and] fail[ed] to properly slope the wall of an excavation, thereby causing the wall of the excavation to collapse, which caused the death of [the deceased]."

The parties agree that this language means that appellants were charged with a failure to perform certain acts, and that those omissions amounted to criminally negligent conduct. The parties also agree that it is not an offense for a person to omit to perform an act. unless a statute makes the specific omission an offense or specifically imposes the duty to act. *See* Ronk v. State, 544 S.W.2d 123 (Tex. Cr. App. 1976).

As part of a plea agreement, the parties chose to "try" the cases solely on pretrial motions. Appellants filed motions to quash the informations, contending that the trial court had no jurisdiction over the cases because they were based on occupational safety issues and that field of law has been preempted by the Federal Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 *et seq.* The trial court denied the motions, and appellants agreed to plead "no contest" while expressly reserving their right to appeal the denial of the motions.

CONTENTIONS ON APPEAL

According to the State, appellants failed to fulfill the obligations under the general duty clause of the Texas Occupational Safety Act (TOSA), Tex. Rev. Civ. Stat. Ann. art. 5182a, § 3 (1987). It provides that an employer shall

furnish and maintain a reasonably safe place of employment. The information in these causes tracked that "duty" language and charged appellants with being criminally negligent by virtue of failing to fulfill a duty to maintain certain safety standards at their place of employment.

Appellants continue to argue that OSHA has completely preempted state action relating to such standards. The State concedes that OSHA standards cover the workplace at issue here, but contends that OSHA does not preempt the exercise of state criminal laws in that workplace.

DISCUSSION

I. OSHA

The Occupational Health and Safety Act was passed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b) (1982). To accomplish this purpose, the Act authorizes promulgation. of workplace health and safety standards. To enforce those standards, OSHA provides civil and criminal penalties. The potential range of these penalties closely approximates or exceeds those available under the Texas criminal statutes under which appellants were convicted.

II. Preemption

The doctrine of preemption derives from the Supremacy Clause, U.S. Const. art. VI, cl. 2, which makes federal

law superior to any conflicting state law. A federal statute preempts a state action if either of two conditions obtains: (1) if Congress evidences, expressly *or by implication*, an intent to occupy a given field, the state action is invalid; (2) if Congress has not chosen to occupy a given field, the state action is invalid only to the extent it conflicts with the workings of the federal law. Silkwood v. Kerr-McGee, 464 U.S. 238, 248 (1984). For convenience, we will label the former type of preemption "absolute" and the latter "conditional."

The question is what effect Congress intended OSHA to have on state laws. The State argues that the state action here does not conflict with federal occupational safety law but rather promotes the policies found in OSHA. We agree. But we find that Congress *implicitly* intended that OSHA accomplish an *absolute* preemption of state laws and actions.

OSHA's legislative history suggests that Congress never explicitly considered the question of the interplay between OSHA and state criminal laws, but instead focused entirely on state occupational safety laws, worker compensation laws and traditional civil tort actions. Consequently, our determination of Congressional intent must be found in the plain language of the statute and case law.

This determination turns on two sections of OSHA: Section 653(b)(4) provides:

> "Nothing in this chapter shall be construed to enlarge or diminish or affect in any manner the common law or statutory rights, duties or liabilities of employers and employees under any

> law with respect to injuries, disease or death of employees arising out of, or in the course of, employment."

Section 667(a) provides:

> "Nothing in this chapter shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."[2]

We read § 667(a) to mean that the states are free to establish and enforce any laws relating to worker safety *so long as* those laws or actions do not entail establishing or enforcing standards affecting occupational safety issues that are addressed by OSHA standards.[3] We are not alone in this interpretation. "[Section 667(a)] has been consistently interpreted by OSHA and the courts to bar the exercise of state jurisdiction over issues addressed by an OSHA standard, even where the state law may arguably be more stringent or where OSHA has not explicitly addressed a provision." New Jersey State Chamber of Commerce v. Hughey, 600 F. Supp. 606 (D.N.J. 1985).

Based on these sections of OSHA, we find that Congress intended by implication to absolutely preempt the field of workplace safety regulation. We hold that § 667(a) absolutely preempts all state regulation of workplace

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[2] Section 655 provides for the promulgation of workplace safety standards.

[3] OSHA also provides for state occupational safety plans that may be enforced if they have been approved by the U.S. Secretary of Labor under OSHA. 29 U.S.C. 667(b). Texas does not have such a federally approved plan.

safety where such regulation would effectively establish state safety standards in areas governed by OSHA.[4]

Nor does § 653(b)(4) save the state action. Courts have held that this section was merely "intended to preserve the existing *private* rights of an injured employee." Frohlick Crane Service, Inc. v. OSCHR, 521 F.2d 628, 631 (10th Cir. 1975) (emphasis added). Section 653(b)(4) addresses only actions between employers and employees, not the relationship between state and federal law or the right of state prosecuting attorneys to bring criminal prosecutions.

We are not the first state court to consider this conflict. Last year, an Illinois appellate court faced the same issue: "whether state criminal prosecutions based on conditions in the workplace are preempted by [OSHA]." People v. Chicago Wire Magnet Corp., 510 N.E.2d 1173 (Ill. App. 1987), *pet. allowed,* 515 N.E.2d 115 (1987).

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[4] The State cites Shimp v. New Jersey Bell Tel. Co., 368 A.2d 468 (N.J. Super. 1976) for the proposition that OSHA does not preempt the field of occupational safety. We disagree.

In *Shimp,* an employer was enjoined from permitting employees to smoke near the plaintiff, who was found to have a common-law right to work in a safe workplace. That case is distinguishable from the one at bar for two reasons. First, it involves a suit between an employer and employee, not a new cause of action in favor of the State. Second, the employer's action does not implicate § 667(a), which specifically preempts only state regulation of matters for which a federal standard exists under § 650. But Shimp's employer was merely charged with violating the general duty language of OSHA § 654 (failing to provide a safe workplace) – not, as in this case; an OSHA standard promulgated under § 650.

In that case, an employer was charged with aggravated battery for exposing employees to federally regulated substances and for violating OSHA standards for working conditions. The state alleged that these actions amounted to a breach of the employer's duty to provide a safe workplace for the employees. The defendants argued that OSHA preempted the exercise of even state criminal laws in the area of workplace safety standards. The appellate court agreed with defendants and affirmed the trial court's dismissal of the indictments.

We concur with that court's holding that OSHA preempts any state regulation of workplaces governed by OSHA safety standards, to the extent that such regulation effectively establishes new workplace safety standards. We also believe that the criminal prosecutions here amount to such regulation.

While the criminal actions here do not literally purport to establish worker safety standards, the criminal charges were based on a failure to perform a duty found in a statute which *does* prescribe safety standards. The practical effect of such charges is to set up a body of state law affecting workplace safety issues already governed by federal standards promulgated pursuant to § 655 of OSHA. Specifically, the effect is to establish local standards governing the digging of trenches, a subject regulated in detail by 29 C.F.R. §§ 1926.650-1926.653, the OSHA standards for trenching promulgated pursuant to § 655.

Section 667(a) and the cited cases make it clear that such state regulation is entirely preempted by federal law. By using the TOSA language in its complaints, the

State implicitly acknowledges that it is attacking the appellants' failure to maintain safe working conditions. But even if the State had not used the TOSA language, criminal prosecution based on the violation of state or local standards for working conditions would still amount to an impermissible attempt to regulate, through the state criminal laws, conduct now regulated under OSHA. By prosecuting appellant for not digging trenches safely, the State intruded on an area covered by OSHA regulations. And if the State could do this, an employer could meet OSHA standards but still be prosecuted by the State, a result inconsistent with OSHA's intent to establish uniform safety standards.

Since our original opinion in this case was handed down, another state intermediate appellate court decided a similar case, and held contrary to this opinion and the *Chicago Magnet* case. State ex rel. Cornellier v. Black, No. 87-1120 W, (Wisconsin Court of Appeals, April 21, 1988) (not yet reported). While both the Illinois and Wisconsin opinions are well-written and persuasive, we must disagree with the latter.

That opinion holds that even if Congress had manifested an intent to preempt state regulation in the occupational safety field, the "congressional intent to preempt must fail where the activity sought to be regulated touches matters which are 'deeply rooted' in local feeling and responsibility." *Cornellier* at p. 8. As support for this "local interest" exception, the Wisconsin court cites Brown v. Hotel Employees, 468 U.S. 491, 502-3 (1984). But unlike OSHA, the federal statute in *Brown* (the National Labor Relations Act) "neither contains explicit preemptive language nor otherwise indicates a congressional

intent to usurp the entire field of labor-management relations." *Brown* at 501. Thus, the Supreme Court analyzed the preemption issue under the rubric of *conditional* – not absolute – preemption, in which the determinative issue is the compatibility of the state and federal laws at issue. Since we have found that unlike the NLRA, the OSHA statute involved in this case *does* indicate implied congressional intent to usurp the entire field of occupational safety, the local interest exception does not apply.

We are, of course, sympathetic to the plight of the deceased workers' families in these cases, and mindful of the compelling need for effective enforcement of workplace safety standards. We also recognize the legitimate desire of state prosecutors to address what has unquestionably become a serious national problem.

But we are also mindful of the substantial sanctions available to *federal* prosecutors under the Act. Violators of specific OSHA standards or of the federal act's "general duty" clause may face civil penalties of up to $1000 and up to $10,000 for "willful" or repeated violations.[5] OSHA also provides criminal penalties, including fines of up to $10,000 and up to six months' imprisonment for employers who violate standards; the penalties double for repeat violators.[6] It is also likely that an OSHA violator would be subject to even stronger fines – up to $250,000 for individuals and $500,000 for a corporation – if, before November 1, 1987, the employer committed acts constituting a misdemeanor that resulted in an

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[5] 29 U.S.C. § 666(a)-(c).

[6] 29 U.S.C. § 666(e).

employee's death.[7] Federal law, therefore, permits fines and penalties at least as great as, and potentially far greater than, the state penalty sought to be imposed here.

Moreover, the Texas legislature may, if it believes OSHA to be inadequate, successfully submit a Texas occupational safety plan to the Secretary of Labor. Finally, Congress could make its intent clear by explicitly exempting, in § 653(b)(4) or § 667(a), state criminal prosecutions from OSHA preemption. But such action, in the face of legal precedent to the contrary, is not for a state intermediate appellate court to take.

CONCLUSION

The judgments of the trial court are reversed and reformed to show judgments of acquittal in both causes.

Jimmy Carroll, Justice

[Before Justices Powers, Brady and Carroll; Justice Brady not participating]

Reversed and Reformed on Both Causes

Filed: August 31, 1988

[Publish]

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[7] 18 U.S.C. § 3623 (Supp. 1988), repealed, Pub. L. 98-473, Title II, § 212(a)(2), Oct. 12, 1987). *See Safety Violations Resulting in Death Punishable by High Fines, Official Says*, 17 O.S.H. Rep. (BNA) No. 12 at 483 (August 19, 1987).

SABINE CONSOLIDATED, INC. & JOSEPH TANTILLO, Appellants

NOS. 1069-88 & 1070-88 v.

THE STATE OF TEXAS, Appellee

Petition for Descretionary Review from the Third Court of Appeals [TRAVIS County]

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

The issue we consider in this case is whether the Occupational Safety and Health Act of 1970 (OSHA or the Act) (29 U.S.C. § 651 *et seq.* 1982), preempts Texas from prosecuting appellants for criminally negligent homicide under Tex. Penal Code Ann. § 19.07.

Appellant Tantillo was the president of appellant Sabine Consolidated, Inc. (Sabine). Both appellants pled nolo contendere to the offense of criminally negligent homicide. Sabine was fined $10,000.00, and Tantillo was sentenced to confinement for 180 days, probated for one year, and fined $2,000.00. The charges arose from an excavation trench cave-in on September 10, 1985, in which two employees of Sabine were killed when the walls of the trench collapsed, burying them.

The Court of Appeals reversed the convictions and ordered acquittals. *Sabine Consolidated, Inc. v. State*, 756 S.W.2d 865 (Tex.App. – Austin, 1988). The Court of Appeals held that the OSHA provisions reflect implied intent by Congress to usurp the entire field of occupational safety such that criminal prosecution, based upon

the violation of state or local standards for working conditions, invades that area of occupational safety preempted by OSHA. We granted the State's petition for discretionary review to address the preemption issue.

Tex. Penal Code Ann. § 19.07 provides that a person commits an offense if he causes the death of an individual by criminal negligence.

The State charged appellants with criminally negligent homicide by alleging a failure to act; to so charge there must be a statutory duty to act. See *Billinoslea v. State*, 780 S.W.2d 271 (Tex.Cr.App. 1989). To establish a duty to act, the State relied upon the Texas Occupational Safety Act, (TOSA), V.A.C.S., Article 5182a, § 3, which provides:

> Every employer shall furnish and maintain employment and a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain, and use such methods, processes, devices, and safeguards, including methods of sanitation and hygiene, as are reasonably necessary to protect the life, health, and safety of such employees, and shall do every other thing reasonably necessary to render safe such employment and place of employment.

The informations alleged, in pertinent part, that appellants were criminally negligent by:

> fail[ing] to furnish and maintain a place of employment which was reasonably safe and healthful for the said [deceased], an employee of the said [appellant], and the said [appellant] did then and there fail to install and maintain and use such methods and processes and devices

and safeguards as were reasonably necessary to protect the life and health and safety of the said [deceased], by then and there failing to provide an adequate shoring system for the wall of an excavation and by then and there failing to properly slope the wall of an excavation, thereby causing the wall of the said excavation to collapse, which caused the death of the said [deceased], when the said [appellant] had a duty to furnish and maintain a place of employment which was reasonably safe and healthful for the said [deceased] and the said [appellant] had a duty to install and maintain and use such methods and processes and devices and safeguards as were reasonably necessary to protect the life and health and safety of the said [deceased].

OSHA

The purpose and policy of OSHA is "to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources" 29 U.S.C. § 651(b). To further that purpose Congress authorized the creation of occupational safety and health standards and regulations for "businesses affecting interstate commerce," 29 U.S.C. § 651(3), and enacted a general duty provision for such employers. 29 U.S.C. § 654.[1]

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[1] Section 654 states:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from

(Continued on following page)

The Act also provides for civil and criminal penalties for violations of the general duty provision or any standard, rule, order, or regulation promulgated pursuant to the Act. 29 U.S.C. § 666. Under this section the following penalties may be assessed: for a "willful or repeated violation" of specific OSHA standards or the general duty provision, a civil penalty of not more than $10,000.00 may be assessed for each violation; for a "serious violation", meaning there is a substantial probability that death or serious physical harm could result from a condition that exists or from practices or methods in place, a civil penalty of not more than $1,000.00 shall be assessed; for a violation determined not to be serious, a civil penalty of up to $1,000.00 may be assessed; for failure to correct a cited violation, a civil penalty of up to $1,000.00 a day until corrected; for a "willful violation" of OSHA standards which cause death, a criminal penalty of imprisonment for not more than 6 months and/or a fine of not more than $10,000.00 may be assessed; slightly stiffer penalties for one previously convicted of such violation(s); and finally, criminal penalties ranging from imprisonment for 6 months and a fine of between

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(Continued from previous page)

recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

$1,000.00 and $10,000.00 may be assessed for giving advance notice of inspection or making false statements for information required under the Act.

Despite the availability of these penalties OSHA is primarily prophylactic in nature. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12, 100 S.Ct. 883, 890, 63 L.Ed.2d 154, 164 (1980). The Act seeks to establish standards and regulations to prevent death or injury from occurring in the workplace.

PREEMPTION

The doctrine of preemption is based upon the supremacy clause of the United States Constitution, Article VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23, 73 (1824). Federal law may supersede state law in three ways. First, Congress can expressly state that the particular federal law preempts state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 614 (1977). Second, Congressional intent to preempt can be implied from the scheme of federal regulation which is sufficiently comprehensive to make a reasonable inference that Congress left no room for the states to supplement it. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). Implied intent can also be found where the federal interest in the field is so strong that it precludes state laws on the same subject. Third, federal law preempts state law when the state law conflicts with the federal law. This conflict occurs when compliance

with federal and state laws is, in effect, a physical impossibility, *Florida Lime & Avocado Growers. Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248, 256-257 (1963), or when the state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.581, 587 (1941). See also *Hillsborough County, Fla. v. Auto. Med. Labs.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714,721 (1985).

OSHA permits states to preempt federal standards of occupational safety and health by adopting their own such standards and plan fo. enforcement, which must be approved by the Secretary of Labor. 29 U.S.C. § 667. The Act also specifies that states may assert "jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6 [29 USCS § 655]." 29 U.S.C. 667(a). Finally, § 653(b)(4) states:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

EXPRESS PREEMPTION

We will first address the express preemption issue.

Section 667 states, in part:

> Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6 [29 USCS § 655].
>
> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 [29 USCS § 655] shall submit a State plan for the development of such standards and their enforcement.

Under this section Congress clearly preempted state occupational safety and health laws and standards for "businesses affecting interstate commerce" unless the State takes steps to establish its own program in accord with OSHA requirements for substituting state standards. However, we do not believe that Congress intended that state criminal laws which affect or involve occupational safety and health be preempted. See and cf. *New York Dep't. of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688, 696 (1973). There is no express language to that effect and other provisions indicate no such intent.

The term "occupational safety and health standard" is defined in the Act as "a standard which requires conditions, or the adoption or use of one or more practices,

means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). The criminally negligent homicide statute is not a standard as defined by OSHA, even though, as in this case, it involves a duty. Tex. Penal Code Ann. § 19.07 does not set conditions or establish practices or processes to ensure a safe workplace. Surely, it may foster the development of standards to do just that. Unlike OSHA, which is designed to establish standards to prevent death or injury from occurring, criminal laws are reactive, punishing for acts committed. While OSHA has penalty provisions for violations of standards and duties, the provisions are not designed to cover a broad range of criminal conduct. *Id.* § 666. They are limited to "willful" conduct when a death results, rather than negligent conduct. Also, the penalty range is primarily civil in nature and fairly minor as compared to criminal penalties which include a broad range from misdemeanor punishment for negligent homicide to felony punishment for "intentional" murder.

In *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), cert. denied *sub nom Asta v. Illinois*, ___ U.S. ___, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989), the Illinois Supreme Court reversed an appellate court decision which had found state criminal law preempted by OSHA.[2] In

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[2] At the time of its opinion, the Court of Appeals did not have the benefit of the decision of the *Illinois Supreme Court in People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), which reversed the lower court opinion relied upon by the Court of Appeals in this cause.

disposing of a claim of express preemption on the grounds that state criminal laws implicitly enforced occupational health and safety standards, the Court stated:

> Although the imposition of sanctions under State penal law may effect a regulation of behavior as OSHA safety standards do, regulation through deterrence, however, is not the sole purpose of criminal law. For example, it also serves to punish as a matter of retributive justice. Too, whereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general. In contrast, occupational health and safety standards are promulgated under OSHA primarily as a means of regulating conduct to prevent injuries in the workplace.

Id. at 966. See also *People v. Hegedus*, 443 N.W.2d 127 (Mich. 1989).

Nowhere in the Act is there language stating that Congress preempted any other laws or *all laws affecting* workplace safety and health. Section 653(b)(4) indicates the opposite as it specifically and broadly allows and does not "in any manner affect workmen's compensation law or . . . the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." (Emphasis added).

The Court of Appeals and appellants argue that this language reserves only private rights, citing *Frohlick Crane Service, Inc. v. OSCHR*, 521 F.2d 628, 631 (10th Cir. 1975); *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir.

1975). While such interpretation is plausible, the language itself is subject to a broader interpretation that includes state criminal laws – "under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." Given the reservation of other private rights in the broad language of § 653(b)(4), and their incidental regulatory effect, it makes sense that criminal laws were likewise not meant to be preempted.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Supreme Court upheld an award for punitive damages in a state tort law action based upon injuries caused by excessive radiation suffered by Karen Silkwood when she was an employee of Kerr-McGee. Kerr-McGee argued that punitive damages were unauthorized because it punished and deterred conduct related to radiation hazards, an area of nuclear safety preempted by the federal government. The Supreme Court held that Congress had indicated that state tort law remedies were not foreclosed. The Court stated:

> It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

Id. at 256.

In *Silkwood*, the Court upheld an action based upon state law that was not specifically provided for in the federal law and which affected an area preempted by

federal law. The instant case is similar. Congress specifically permitted the "regulatory consequence" of state tort law upon OSHA. 29 U.S.C. § 653(b)(4). If, in enacting OSHA, Congress was explicitly willing to allow the incidental regulation caused by damage awards under State tort law through § 653(b)(4), "it cannot plausibly be argued that it also intended to preempt State criminal law because of its incidental regulatory effect on workplace safety." *Chicago Magnet Wire Corp.*, supra at 968. We conclude that Congress did not *expressly* preempt enforcement of state criminal laws in an area regulated by OSHA.

The purpose of state criminal laws and criminally negligent homicide in particular, is not to set standards for workplace safety. The purpose is to punish one for an illegal act as defined by the penal code, whether that act be done in the workplace or elsewhere. OSHA is not designed to deal with state criminal offenses. Simply because a state criminal law may incidentally concern an area controlled by federal law, this fact alone does not make the state law impermissible. Therefore, state criminal laws are not preempted by federal law aimed at safeguarding the workplace.

IMPLIED PREEMPTION

The second way in which state law may be preempted by federal law is where preemption can be implied from the federal regulation. The Court of Appeals held that OSHA, in particular § 667(a), reflects an implied intent by Congress to preempt the field of

occupational safety and health such that even state criminal laws that affect that field are forbidden or precluded. *Sabine Consolidated, Inc.*, 756 S.W.2d at 869. That Court further held that the State's criminal prosecution based upon a statute that prescribes safety standards, in effect, established local standards governing trenches when OSHA had already regulated that area. See 29 CFR § 1926.650-1926.652. The Court of Appeals reasoned that even if the State had not used the TOSA language, "criminal prosecution based on the violation of state or local standards for working conditions would still amount to an impermissible attempt to regulate, through the state criminal laws, conduct now regulated under OSHA." *Id.*

In *Auto. Med. Labs*, ___ U.S. ___, 105 S.Ct. 2371, the Supreme Court stated two ways in which implied intent to preempt can be shown: (1) where the scheme of federal regulation is so comprehensive as to leave no room for the state to supplement it or (2) where the federal interest is so strong that it overrides any state action on the same subject. In the instant case the Court of Appeals found implied intent to preempt because the federal regulation is sufficiently comprehensive that Congress left no room for the States to supplement it. Section 667(a) provides that a state may develop its own standards where no federal standard exists and that a state may substitute its own program if approved by the Secretary of Labor. The Court of Appeals discounts the language of § 653(b)(4), as applicable only to private rights. *Sabine Consolidated, Inc.*, 756 S.W.2d at 863.

Much of our previous discussion of §§ 667 and 653(b)(4) also disposes of the implied intent theory. Given that workers' compensation, common law claims and

state tort claims can exert a similar kind of regulatory effect as the enforcement of criminal laws for acts occurring in the workplace, we cannot reasonably conclude that Congress would preempt criminal laws while allowing other causes of action. Otherwise, an employer who causes the death of an employee by providing unsafe working conditions would be able to escape state criminal prosecution and suffer only the comparatively minor punishment provided by OSHA. In light of § 653(b)(4) and the several specified actions available, such a result does not seem implied or intended. Thus, we find the federal regulations do not bar the regulatory consequence of state criminal actions.

The federal interest in workplace safety is not so great as to preempt all state interest in this area. First, under § 667, a state may establish its own standards to govern the workplace, subject to approval by the Secretary of Labor. Second, § 653(b)(4) leaves available state law claims in this field. Third, the State's own interest in regulating health and safety matters "is primarily, and historically, a matter of local concern." *Auto. Med. Labs,* 471 U.S. at 719, 105 S.Ct. at 2378, 85 L.Ed.2d at 725. This local interest, combined with the State's traditional interest in its own police power to enforce criminal laws, demonstrate that the federal interest does not prevent the state from asserting its traditional powers in enforcing criminal laws, despite the incidental impact of such laws on OSHA.

CONFLICT PREEMPTION

The last way in which state law may be preempted by federal law is when the state law conflicts with the federal law either where: 1) compliance with state and federal law is, in effect, a physical impossibility, see *Florida Lime & Avocado Growers, Inc.* supra; or 2) the state law conflicts with the purpose and objectives of Congress and the federal law. *Auto. Med. Labs,* ___ U.S. ___, 105 S.Ct. 2371.

Neither the Court of Appeals nor appellants suggest that conflict preemption exists. Enforcement of the criminally negligent homicide statute in this case does not conflict with any regulations or provisions of OSHA so that compliance with state and federal law is an impossibility. The duty with which appellants were charged with violating is a general duty similar to the general duty provided for in § 654(a). This statute certainly does not hinder the purpose and objectives of OSHA. If anything, it supports the OSHA duty and standards. Thus, the doctrine of conflict preemption does not support the conclusion that OSHA preempts prosecution under state criminal laws.

CONCLUSION

Several other states have addressed this same issue, all of them concluding that state criminal laws were not preempted by OSHA. *Chicago Magnet Wire Corp.*, supra; *People v. Hegedus*, supra; *People v. Pymm*, 76 N.Y.2d 511, 563 N.E.2d 1, 561 N.Y.S.2d 687 (1990); *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (1988); see also *People v. Brom*, 185 Ill.App.3d 411, 541 N.E.2d 745

(1989) and *Commonwealth v. Morris*, 394 Pa.Super. 185, 575 A.2d 582 (1990).[3]

The application of our criminal laws, in this instance § 19.07, supra, to conduct in the workplace does not present an obstacle to the accomplishment of OSHA's stated goal of assuring employees safe and healthful working conditions. The prosecution of appellants for criminally negligent homicide was proper. We reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals to consider appellant's remaining points of error.

BAIRD, Judge

Clinton, J., concurs in the result. Teague, J., finding that the opinion by the Third (Austin) Court of Appeals, see *Sabine Consolidated. Inc. v. State*, 756 S.W.2d 865 (Tex.App. – Austin 1988), has more than adequately disposed of the issue whether OSHA preempts Texas from prosecuting appellants for criminally negligent homicide under Tex. Penal Code Ann. § 19.07, and correctly decides that issue

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[3] We also note that a congressional committee on government operations approved and adopted a report recommending to Congress that "OSHA should take the position that the States have clear authority under the Federal OSH Act, as it is written, to prosecute employers for acts against their employees which constitute crimes under State law." *Chicago Magnet Wire Corp.*, 534 N.E.2d at 970, citing Report of House Comm. on government Operations, *Getting Away with Murder in the Workplace: OSHA's Non-use of Criminal Penalties for Safety Violations*, H.R.Rep. No. 1051, 100th Cong., 2d Sess. 9 (1988).

in favor of appellants, and against the State, respectfully dissents. Maloney, J., not participating.

(Delivered February 13, 1991)

En banc

Publish

IN THE COURT OF APPEALS, THIRD DISTRICT
OF TEXAS, AT AUSTIN

ON REMAND

NO. 3-87-051-CR

SABINE CONSOLIDATED, INC.,
APPELLANT

vs.

THE STATE OF TEXAS,
APPELLEE

NO. 3-87-055-CR

JOSEPH TANTILLO,
APPELLANT

vs.

THE STATE OF TEXAS,
APPELLEE

FROM THE COUNTY COURT AT LAW
NO. 1 OF TRAVIS COUNTY,
NOS. 269,530, 269,532,
HONORABLE LESLIE D. TAYLOR, JUDGE

After the trial court denied their pretrial motions, appellants pleaded nolo contendere to the charge of criminally negligent homicide, a class A misdemeanor. *See* Tex. Pen. Code Ann. § 19.07 (1989). The trial court accepted the pleas, found both appellants guilty, and then assessed punishment, fining Sabine Consolidated, Inc. $10,000 and Joseph Tantillo $2,000 and sentencing Tantillo to 180 days' confinement. We will affirm the trial court's judgments.

BACKGROUND

In September 1985, two construction workers employed by Sabine Consolidated, Inc., a construction company, were killed when the trench they were working in collapsed. Joseph Tantillo was president of Sabine at the time.

The State filed complaints and informations charging Sabine and Tantillo with criminally negligent homicide. The State asserted essentially that appellants failed to adequately shore and slope the trench, which caused the workers' deaths. Sabine was charged with causing the death of one of the workers, and Tantillo was charged with causing the death of the other.

As part of a plea agreement, the parties "tried" the cases solely on appellants' pretrial motions. The trial court denied the motions, and appellants agreed to plead "no contest" to the charges while expressly reserving their right to appeal the denial of their motions. The trial court accepted the pleas and found both appellants guilty.

Sabine and Tantillo appealed to this court, challenging the trial court's disposition of their pretrial motions. On our first review of these cases, we reversed the trial court's judgments based on our conclusion that the Federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C.A. §§ 651-678 (1985), preempts state criminal prosecutions based on the violation of state or local standards for working conditions. Sabine Consolidated, Inc. v. State, 756 S.W.2d 865, 869 (Tex. App. 1988). The Court of Criminal Appeals reversed this court's decision, holding that OSHA did not preempt these criminal prosecutions, and remanded the cases to this court for consideration of the appellants' remaining arguments. Sabine Consolidated, Inc. v. State, 806 S.W.2d 553 (Tex. Cr. App. 1991). We therefore turn to appellants' five other points of error.

In four points of error, appellants assert that the Texas Occupational Safety Act (TOSA), Tex. Rev. Civ. Stat. Ann. art. 5182a (1987), is unconstitutionally vague as applied to them and that their respective informations were defective in various respects. In addition, Sabine argues that its information failed to allege an offense for which a corporation may be liable. For his part, Tantillo alleges that Tex. Pen. Code Ann. § 7.23, which imposes liability on corporate agents, is unconstitutionally vague as applied to him. We will address each of these arguments in turn.

DISCUSSION

I. ARTICLE 5182a

At the heart of appellants' complaints is the argument that TOSA is unconstitutionally vague. TOSA imposes on employers the duty to:

> [F]urnish and maintain employment and a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain, and use such methods, processes, devices, and safeguards, including methods of sanitation and hygiene, as are reasonably necessary to protect the life, health, and safety of such employees, and shall do every other thing reasonably necessary to render safe such employment and place of employment.

Tex. Rev. Civ. Stat. Ann. art. 5182a, § 3 (1987). Appellants argue that this statute did not give them notice that they owed their workers a duty to adequately shore and slope the trench.

A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice of what conduct the statute prohibits, or if it is so indefinite that it encourages arbitrary and erratic arrests and convictions. Coleman v. State, 632 S.W.2d 616, 619 (Tex. Cr. App. 1982).

In analyzing a statute for vagueness, where no First Amendment rights are involved, we need determine only if the statute is impermissibly vague as applied to the challenging party's specific conduct. Bynum v. State, 767 S.W.2d 769 (Tex. Cr. App. 1989). Thus, we must determine

if TOSA is unconstitutionally vague as applied to appellants' alleged failure to adequately shore and slope the trench.

We conclude that the general duty imposed by TOSA is sufficient to give an employer of ordinary intelligence notice that the employer owes a duty to ensure that employees working in an excavation are reasonably safe. This general duty necessarily entails shoring and sloping appropriate to the excavation involved. We further conclude that TOSA does not encourage erratic and arbitrary arrests and convictions in that it provides a definite framework within which to determine if conduct is punishable.

In this regard, we note that the question of whether an employer has breached his duty under TOSA is one for the fact finder. A statute is not void merely because culpability must be determined on a de facto basis. *See* Smith v. United States, 431 U.S. 291, 308-09 (1977) (statute prohibiting distribution of obscene materials through the mail not unconstitutionally vague merely because different fact finders might reach different conclusions as to whether the same material is obscene); Ketchum v. Ward, 422 F. Supp. 934, 941 (D.N.Y. 1976), aff'd, 556 F.2d 557 (2d Cir. 1977) (prosecution of doctor for criminally negligent homicide for death of patient does not violate constitution merely because attorney could not determine in advance to what standard doctor would be held).

Further, a statute is not unconstitutionally vague merely because it involves only a general standard. *See* Peterson v. Goodwin, 512 F.2d 479 (5th Cir.), cert. denied,

423 U.S. 931 (1975) (officer charged with conduct prejudicial to good order and discipline in the armed forces cannot actually have doubted that his sale of heroin to fellow airmen was an offense); McCall v. State, 540 S.W.2d 717, 719 (Tex. Cr. App. 1976) (statute criminalizing conduct of intentionally or knowingly failing "unreasonably to provide necessary food, care, or shelter for an animal in [person's] custody" is not vague or indefinite); Gano v. State, 466 S.W.2d 730, 732 (Tex. Cr. App. 1971) (statute prohibiting operation of an automobile at a greater speed than is reasonable and prudent under the circumstances is not vague).

Appellants cannot reasonably have believed that they had complied with their duty to provide their employees a safe and healthful workplace when they failed to adequately slope and shore the trench in this case. We overrule this point.

II. THE INFORMATIONS

Appellants direct their next series of points at the informations. They contend the informations are defective because: (1) the informations fail to identify a statute which imposed on appellants a duty to act; (2) criminally negligent homicide cannot be committed through an omission; (3) the informations fail to allege the manner and means of death; and (4) the second paragraph of each information fails to state an offense. The informations are identical, except for the names of the accuseds and of the alleged victims.

A. Duty to Act

First, appellants assert that the informations are fundamentally defective because they do not set forth the statute that created the duty appellants breached by failing to provide a safe workplace.

An information is fundamentally defective if it does not allege an offense. Ronk v. State, 544 S.W.2d 123, 125 (Tex. Cr. App. 1976). A failure to act – an omission – is not an offense unless the defendant had a statutory duty to act. Tex. Pen. Code Ann. § 6.01(c) (1974); Billingslea v. State, 780 S.W.2d 271, 276 (Tex. Cr. App. 1989). An information charging a criminal omission must therefore set forth facts which give rise to a statutory duty to act. *Ronk*, 544 S.W.2d 125 (indictment alleging injury to a child by neglect was defective because it did not allege parent-child relationship). *See also* Smith v. State, 603 S.W.2d 846, 847 (Tex. Cr. App. 1980); Lang v. State, 586 S.W.2d 532, 533-34 (Tex. Cr. App. 1979).

The informations in these cases allege that the appellants were the employers of the respective deceased workers. TOSA imposes on employers the duty to provide their workers with safe workplaces. Tex. Rev. Civ. Stat. Ann. art. 5182a (1987). Thus, the informations sufficiently set forth the facts – the employer-employee relationship – which gave rise to the statutory duty on appellants' part to provide a safe workplace.

Appellants insist that the informations are defective because they do not mention or refer to article 5182a. We disagree. No Texas court has required an information that alleges a criminal omission to identify the statute which

created the duty to act, and we decline to recognize such a requirement. An accused is entitled to notice of the omissions he is alleged to have committed. Tex. Const. Ann. art. 1, § 10 (1984); State v. Carter, ___ S.W.2d ___ (Tex. Cr. App. 1991). It is not also necessary that the accused be referred to the statute that imposed on him a duty to act, as such information is not necessary to the preparation of his defense.

Appellants also contend that article 5182a did not impose on them the duty to properly slope and shore the trench walls. We disagree. While article 5182a does not specifically require employers to properly slope and shore trench walls, it does impose on them the general duty to provide a "reasonably safe and healthful" workplace. The informations allege that appellants breached this general duty. We believe that the general duty encompasses all actions necessary to its accomplishment. That the State chose to elaborate by describing specifically how the appellants breached this duty does not render the indictments defective.

B. Voluntary, Negligent Omission

Appellants advance a new argument on remand. They contend that criminally negligent homicide may not be committed through an omission. In this regard, appellants rely on Dowden v. State, 758 S.W.2d 264 (Tex. Cr. App. 1988). Since appellants did not raise this argument the first time these cases came to this court, however, they have waived this point of error. *See* Tex. R. App. P. Ann. 74(d) (Pamph. 1991).

Even if appellants had not waived this argument, their reliance on *Dowden* is misplaced. Dowden was charged with the capital murder of a police officer who was shot by another officer during an attempted jail break led by Dowden. On appeal, Dowden challenged the trial court's refusal to charge the jury on criminally negligent homicide as a lesser included offense. The Court of Criminal Appeals upheld the trial court's decision and, in so doing, stated "The actions of appellant in the instant case toward the deceased were all voluntary and under the circumstances the issue of criminally negligent homicide was not raised." 758 S.W.2d at 271.

Appellants contend that the quoted sentence from Dowden means that criminally negligent homicide is, by definition, not voluntary conduct. They correctly point out that a failure to act must be voluntary to be an offense. *See* Tex. Pen. Code Ann. § 6.01(a). Therefore, they conclude, criminally negligent homicide cannot be committed through a failure to act.[1]

Dowden does not stand for the principle appellants champion. The quoted sentence is only a portion of the *Dowden* court's discussion regarding the requested charge. The court begins this discussion by reviewing the two-pronged test for submission of lesser included offenses, especially the requirement that there be some evidence that the accused, if guilty, is guilty only of the

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[1] Taken to its extreme, appellants' argument would render unenforceable the statute prohibiting criminally negligent homicide because no conduct – act, omission or possession – may be an offense unless the accused engages in it voluntarily. *See* Tex. Pen. Code Ann. § 6.01(a).

alleged lesser included offense. *Dowden*, 758 S.W.2d at 268; *see also* Royster v. State, 622 S.W.2d 442, 446 (Tex. Cr. App. 1981). The *Dowden* court then concludes that there was no evidence suggesting the defendant acted merely negligently. 758 S.W.2d at 270. Thus, the discussion appellants rely on stands for the proposition that the trial court, in that case, was not required to charge the jury on criminally negligent homicide as a lesser included offense because there was no evidence that the accused acted merely negligently. The voluntariness or involuntariness of the defendant's conduct was never at issue. We overrule this point.

C. Manner and Means

Next, appellants complain that the informations are defective because they fail to allege the "manner and means of death." Specifically, appellants complain that the informations fail to state how the collapse of the trench caused the workers' deaths. Appellants' argument is not persuasive. The term "manner and means" refers to the alleged offender's conduct. *See* Solis v. State, 787 S.W.2d 388, 391 (Tex. Cr. App. 1990). There is no requirement that an information allege how the offender's conduct caused death.

Further, the State was not required to allege the manner and means in this case. A failure to allege manner and means is not in and of itself fundamental error. Edlund v. State, 677 S.W.2d 204, 209 (Tex. App. 1984, no pet.). There are two circumstances in which the State must allege manner and means: (1) when it is the manner

and means that makes otherwise innocent activity criminal, Posey v. State, 545 S.W.2d 162, 163 (Tex. Cr. App. 1977); (2) when the statute that defines the offense provides for more than one manner or means to commit the prohibited conduct, State v. Carter, ___ S.W.2d ___ (Tex. Cr. App. 1991). Neither of these situations exists in this case. This point is overruled.

D. Paragraph II of the Informations

Finally, appellants contend that the second paragraph of each information fails to allege an offense. The second paragraphs allege that appellants created, maintained, and controlled an excavation which was inadequately sloped and shored, which did not have an adequate means of exit, and "which had heavy machinery operating in close proximity."

Appellants' arguments regarding the second paragraphs echo their arguments regarding the first paragraphs: they assert that there is no statute imposing on them the duties they allegedly breached. We read the second paragraphs as alleging an alternate manner in which appellants failed to provide a reasonably safe and healthful workplace. We therefore overrule this point for the reasons set forth above.

III. CORPORATE RESPONSIBILITY

Sabine contends the trial court erred because a corporation may not be convicted of criminally negligent homicide. In its original brief, Sabine relied on Vaughan and Sons, Inc. v. State, 649 S.W.2d 677 (Tex. App. 1983). When

this court first considered Sabine's appeal, the Court of Criminal Appeals had granted the State's petition for discretionary review in *Vaughan and Sons*, but had not handed down its decision. Since then, the Court of Criminal Appeals has held that a corporation *can* be convicted for criminally negligent homicide. Vaughan and Sons, Inc. v. State, 737 S.W.2d 805 (Tex. Cr. App. 1987). Accordingly, we overrule this point of error.

IV. AGENCY LIABILITY

Tantillo complains that the trial court erred because § 7.23(b) of the Penal Code, which imposes liability on corporate agents, is unconstitutionally vague. Section 7.23(b) provides:

> An agent having primary responsibility for the discharge of a duty to act imposed by law on a corporation or association is criminally responsible for omission to discharge the duty to the same extent as if the duty were imposed by law directly on him.

Tex. Pen. Code Ann. § 7.23(b) (1974). Tantillo complains that the term "primary responsibility" is vague and indefinite.

We disagree. A statute that contains an undefined term is not unconstitutionally vague if the term is an ordinary term in common use. Alexander v. State, 630 S.W.2d 355, 358-59 (Tex. App. 1982, no pet.). The term "primary responsibility" is one in common use. The statute is not, therefore, vague and indefinite. We overrule this point.

CONCLUSION

The Court of Criminal Appeals has already addressed appellants' first points of error. We conclude that the remaining points of error are without merit. Accordingly, we overrule Sabine's and Tantillo's points of error two through six and affirm the trial court's judgments.

Jimmy Carroll, Chief Justice

[Before Chief Justice Carroll, Justices Jones and B. A. Smith]

Affirmed

Filed: August 28, 1991

[Publish]

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 3, 1991
COA# 03-87-00055-CR

On this day, the Appellant's Motion for Rehearing was denied.

JUDGE MALONEY NOT PARTICIPATING.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL
AUSTIN, TEXAS 78711

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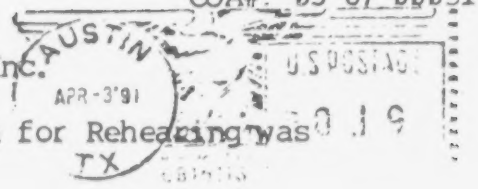
April 3, 1991
COA# 03 87 00051 CR

Ref: Case No. 1069-88
STYLE: Sabine Consolidated, Inc.



On this day the Appellant's Motion for Rehearing was denied.

JUDGE MALONEY NOT PARTICIPATING.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

812 SAN ANT 3 S1080404 ** CR 0105
***** AUTOMATED MAIL (MUM) *****

812 SAN ANTONIO ST #304
AUSTIN TX 78701-2224

BEST AVA

AILABLE COPY

OFFICIAL NOTICE FROM
THIRD COURT OF APPEALS
RE: Case No. 03-87-00051-CR

September 12, 1991

Style: Sabine Consolidated, Inc.
v. The State of Texas

Appellant's motion for extension of time to file motion for rehearing was this day granted by this Court. The Court expects appellant's motion for rehearing to be filed in this Court on or before September 23, 1991.

T. C. Case # 269,530

SUSAN K. BAGE, CLERK

THIRD COURT OF APPEALS
P O BOX 12547
AUSTIN, TEXAS 78711

MAIL TO: MR S RONALD KEISTER
GOTCHER & KEISTER
[illegible]

App. 43

OFFICIAL NOTICE FROM
THIRD COURT OF APPEALS

September 12, 1991

RE: Case No. 03-87-00055-CR

Style: Joe Tantillo
v. The State of Texas

Appellant's motion for extension of time to file motion for rehearing was this day granted by this Court. The Court expects appellant's motion for rehearing to be filed in this Court on or before September 23, 1991.

T. C. Case # 269-532

SUSAN K. BAGE, CLERK

THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

MAIL TO: MR S RONALD KEISTER
GOTCHER & KEISTER
AUSTIN TX 78701-2224

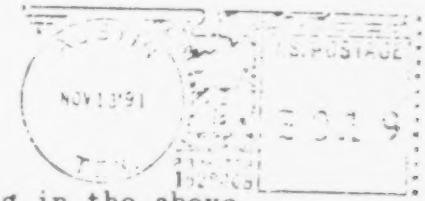
App. 44

BEST AVA

ILABLE COPY

OFFICIAL NOTICE FROM
THIRD COURT OF APPEALS
RE: Case No. 03-87-00051-CR

November 13, 1991



Style: Sabine Consolidated, Inc.
v. The State of Texas

The appellant's motion for rehearing in the above cause was this day overruled by this Court.

NOV 14 1991

T. C. Case # 269,530

SUSAN K. BAGE, CLERK

THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

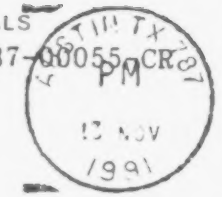
MAIL TO:
MR S RONALD KEISTER
GOTCHER & KEISTER
812 SAN ANTONIO ST
STE 304
AUSTIN TX 78701

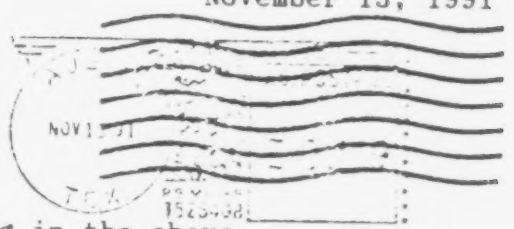
OFFICIAL NOTICE FROM
THIRD COURT OF APPEALS

November 13, 1991

RE: Case No. 03-87-00055-CR

Style: Joe Tantillo
v. The State of Texas





The appellant's motion for rehearing in the above cause was this day overruled by this Court.

NOV 14 1991

T. C. Case # 269-532

SUSAN K. BAGE, CLERK

THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

MAIL TO:
MR S RONALD KEISTER
GOTCHER & KEISTER
812 SAN ANTONIO ST
STE 304
AUSTIN TX 78701

BEST AVAILABLE COPY

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

SABINE CONSOLIDATED, INC. CAUSE NO.
VS. 03-87-0051-CR
STATE OF TEXAS

On this 10th day of DECEMBER, 1991, came on to be considered the motion of the appellant's counsel for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby granted, the time for filing the said item has been extended to the 13TH day of JANUARY, 1992.

IT IS SO ORDERED.

PER CURIAM

SPECIAL NOTE: THIS IS A CORRECTED ORDER.

SPECIAL NOTE: The Petition for Discretionary Review MUST be filed with the Court of Appeals.

SPECIAL NOTE: NO FURTHER EXTENSIONS WILL BE GRANTED.

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: /s/ Louise Pearson
Deputy Clerk

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

JOSEPH TANTILLO
VS.
STATE OF TEXAS

CAUSE NO.
03-87-0055-CR

On this 10th day of DECEMBER, 1991, came on to be considered the motion of the appellant's counsel for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby granted, the time for filing the said item has been extended to the 13TH day of JANUARY, 1992.

IT IS SO ORDERED.

PER CURIAM

SPECIAL NOTE: THIS IS A CORRECTED ORDER.

SPECIAL NOTE: The Petition for Discretionary Review MUST be filed with the Court of Appeals.

SPECIAL NOTE: NO FURTHER EXTENSIONS WILL BE GRANTED.

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: /s/ Louise Pearson
Deputy Clerk

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 8, 1992
COA#: 03-87-00051-CR

RE: Case No. 0122-92
STYLE: SABINE CONSOLIDATED, INC.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: STEVEN RONALD KEISTER
812 SAN ANTONIO
SUITE 304
AUSTIN TX 78701

App. 49

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 8, 1992
COA#: 03-87-00055-CR

RE: Case No. 0123-92
STYLE: TANTILLO, JOE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: STEVEN RONALD KEISTER
812 SAN ANTONIO
SUITE 304
AUSTIN TX 78701

App. 50

NO. 269,530

STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER ONE
	§	
SABINE CONSOLIDATED, INC.	§	TRAVIS COUNTY, TEXAS
	§	

PRETRIAL HEARINGS, PLEA AND SENTENCING

BEFORE: THE HONORABLE LESLIE TAYLOR, JUDGE

APPEARANCES:

MR. KEN ODEN, County Attorney, Stokes Building, Austin, Texas 78701

MR. DAVID PURYEAR, Assistant County Attorney, Stokes Building, Austin, Texas 78701

MR. JOSEPH PARKER, Assistant County Attorney, Stokes Building, Austin, Texas 78701

MR. ROBERT SMITH, Assistant County Attorney, Stokes Building, Austin, Texas 78701

Attorneys for the State

MR. FRANK MALONEY (Maloney, Gotcher & Yeager), 505 West 12th Street, Austin, Texas 78701

MR. S. RONALD KEISTER (Maloney, Gotcher & Yeager), 505 West 12th Street, Austin, Texas 78701

Attorneys for the Defendant

NO. 269,532

STATE OF TEXAS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NUMBER ONE
	§	
JOSEPH TANTILLO	§	TRAVIS COUNTY, TEXAS

PRETRIAL HEARINGS, PLEA AND SENTENCING

BEFORE: THE HONORABLE LESLIE TAYLOR, JUDGE

APPEARANCES:

MR. KEN ODEN, County Attorney, Stokes Building, Austin, Texas 78701

MR. DAVID PURYEAR, Assistant County Attorney, Stokes Building, Austin, Texas 78701

MR. JOSEPH PARKER, Assistant County Attorney, Stokes Building, Austin, Texas 78701

MR. ROBERT SMITH, Assistant County Attorney, Stokes Building, Austin, Texas 78701

Attorneys for the State

MR. FRANK MALONEY (Maloney, Gotcher & Yeager), 505 West 12th Street, Austin, Texas 78701

MR. S. RONALD KEISTER (Maloney, Gotcher & Yeager), 505 West 12th Street, Austin, Texas 78701

Attorneys for the Defendant

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[p. 125] FEBRUARY 13, 1987

PROCEEDINGS

THE COURT: This is 269,530 and 269,531, State of Texas versus Sabine Consolidated, Incorporated. Is the State ready?

MR. ODEN: The State is ready, Your Honor.

THE COURT: All right. Is the Defendant ready, Mr. Maloney?

MR. MALONEY: The Defendant is ready, Your Honor.

THE COURT: All right. Mr. Maloney, who has signed the plea form for the corporation?

MR. MALONEY: Mr. Tantillo did, as President and Chief Executive Officer for the corporation.

THE COURT: All right, and is Mr. Tantillo here?

MR. MALONEY: He is, Your Honor.

THE COURT: Would you have him step up there with you?

MR. MALONEY: Yes, Your Honor.

THE COURT: All right.

[p. 126] Mr. Tantillo, Sabine Consolidated, Incorporated is charged with the offense of criminally negligent homicide in this case. How does the corporation wish to plead?

* * *

[p. 128] MR. MALONEY: The we plead no contest, Your Honor.

THE COURT: All right. I will accept the plea of no contest, and find Sabine Consolidated, Incorporated guilty.

Is the State ready to make a recommendation in this case?

MR. ODEN: Yes, Your Honor, if I may approach the Bench.

This, I believe, is what we intend to be the standard form this Court uses for negotiated pleas. And if I could remind the Court, it is going to be a little unusual.

We have many cause numbers here to be dealt with.

Our basic recommendation, before I muddy up the [p. 129] water, is that on this case, 269,530, the State

recommends, pursuant to its negotiated plea, the maximum fine of $10,000.

THE COURT: All right. Is there anything you need to say before I pronounce that sentence?

* * *

[p. 134] THE COURT: All right, then. What generally is your agreement in regard to Mr. Tantillo's cases?

MR. MALONEY: We have a copy of the plea agreement, Your Honor. It is the same except for the –

THE COURT: Can you simply tell me, will there be a plea of no contest by Mr. Tantillo?

MR. MALONEY: Yes, Your Honor, there will be.

THE COURT: In both death cases?

MR. MALONEY: No. Just in one case.

MR. ODEN: In other words, the corporation is pleading to one death, and the president of the corporation is pleading to the other.

MR. MALONEY: So both of them are covered.

THE COURT: All right, and generally speaking, your agreement in regards to the Tantillo case is what?

MR. MALONEY: That he will receive probation. The State will recommend a $2,000 fine and [p. 135] six months in the Travis County Jail probated for a period of 12 months, plus restitution to the family in the amount of $575.

MR. ODEN: And 15 cents.

MR. MALONEY: Your Honor, in respect to this plea agreement, the Court will notice that the State and the defendant have agreed that the defendant may exercise his right of appeal from a conviction.

And as I understand the statute, CCP 26.13, the defendant may appeal on all pretrial motions that have been filed in writing and presented to the Court, which we intend to do.

There is one problem, and that is that one of those pretrial motions deals with the manner and means of death alleged in the pleadings.

That is not deemed to be fundamental error. And in Adams versus State, at 707 S.W. 2d 900, the appellate court has held that unless the defendant can show some form of prejudice, manner and means is not a viable grounds for reversal.

And for the record I would like to state that but for the Court's ruling on that motion, we would have gone to trial.

Now, the ruling has placed us in a position where we cannot defend against this particular [p. 136] pleading. And it is that ground of prejudice that we are alleging, or will be alleging to the appellate court.

Under Adams I am required to state that in the record here at this time. Otherwise, I have waived that ground. And it is not our intention to waive it, Your Honor.

THE COURT: All right.

MR. MALONEY: And that is true in both cases.

THE COURT: Are we ready to proceed in 269,530?

MR. MALONEY: Yes, Your Honor.

MR. ODEN: The States is ready, your Honor.

MR. MALONEY: The defendant is ready.

THE COURT: This is the earlier one that I called. The defendant is sentenced to pay a fine of $10,000 and the costs of court, pursuant to the plea bargain in this case.

And this is the death case involving Mr. Rodriguez.

MR. ODEN: Yes, Your Honor.

MR. MALONEY: That is correct, [p. 137] Your Honor.

We at this time request that we be allowed to file our written notice of appeal in this case.

THE COURT: Thank you.

[p. 138] THE COURT: This is 269,532, the State versus Joseph Tantillo. The charge is criminally negligent homicide. Is the State ready?

MR. ODEN: The State is ready, Your Honor.

MR. MALONEY: The defendant is also ready, Your Honor, and enters his plea of nolo contendere, subject to the same statements that I made concerning the indictment, or rather the information, and Mr. Oden's interpretation of that indictment.

THE COURT: All right. Mr. Tantillo, would you stand up, please? Mr. Maloney, would you and your client come forward, and Mr. Oden?

Mr. Tantillo, is your plea no contest to the charge of criminally negligent homicide?

MR. TANTILLO: Yes, Your Honor.

THE COURT: I will accept your plea, and find you guilty.

Mr. Oden, are you ready?

MR. ODEN: Yes, Your Honor.

This is another document that I understand to basically track what this Court uses for the State's recommendation and announcement of ready, and in terms [p. 139] of the negotiated plea.

It is our recommendation that the defendant be found guilty, and that he receive the maximum fine under the statute of criminally negligent homicide of $2,000; that he be assessed a six-month jail term; probated for the longest possible term under that statute of 12 months; and that, as a term and condition of his probation, in addition to the normal terms and conditions of probation – "Do not commit any other offenses," et cetera – that he be assessed restitution to the victim's family in this case of $575.15, which I would represent to the Court basically amounts to monies that were not covered in incidental matters by insurance to the victim's family.

I have a list here that I would submit to the Court for its consideration, and some documentation sent by the

legal representatives of the victim's family that sets out some of the matters that we included in restitution.

What we basically did is look at everything that we thought was out-of-pocket expenses up to and even including flowers and necessary clothing for the victim's family to attend the funeral, transportation costs for the body, and everything that we thought was [p. 140] an expense that – some few parts were not covered by insurance, and those are the ones that are submitted here.

And the defendant has agreed to pay them as part of the restitution.

THE COURT: Is that your agreement?

MR. MALONEY: Yes, Your Honor.

THE COURT: All right. Mr. Oden, can you make the same representations to the Court in regards to contact with the victim's family in this case?

MR. ODEN: Yes, Your Honor, I can.

And I would ask that the record basically incorporate all the explanatory comments that we have just made in 269,530 about the basic plan and scheme for disposing of a large number of cause numbers with these two separate pleas.

THE COURT: All right. You have been in touch with the representatives of this family?

MR. ODEN: Yes, ma'am.

THE COURT: And are they satisfied with this arrangement in regards to the cases?

MR. ODEN: The representations of their lawyers are that they are fully supportive of it, proud of the outcome, and fully supportive.

[p. 141] THE COURT: All right. Mr. Tantillo, the Court does find you guilty, based on the plea that you have entered.

Your sentence is 180 days in jail, probated for 12 months.

Your fine is $2,000, with that amount probated, and the requirement that you pay restitution of $575.15 to Mrs. Benjamin Eatmon. Mr. Eickbush here has an address.

You owe the costs of court, which are $95. And I understand that there are some other cases that are to be dismissed as a result of this plea bargain, also.

And the Court will entertain those motions and grant them when they are presented.

You will pay a supervision fee to the Probation Department of $40 each month. And the court costs will be due in no less than 30 days. Will you be able to pay the restitution in that time, also?

MR. MALONEY: We are going to give notice of appeal, Your Honor.

MR. ODEN: Your Honor, for clarification purposes, if I might interrupt, I am not sure I heard you right. But our agreement was that none of the fine would be probated.

And one of my assistants just told me that that [p. 142] document you are reading from might have erroneously represented that some of the fine would be probated. If that is true, we need to alter that. That is not our agreement. The agreement was that he would pay the whole fine.

MR. MALONEY: I don't believe we ever had an agreement to probate it.

THE COURT: All right. The fine is assessed at $2,000, and none of that amount is probated.

MR. MALONEY: Your Honor, we have filed, I guess, a copy of the plea agreement in this case, and filed the one in the other one.

(Whereupon an
(off-the-record
(discussion ensued.

MR. MALONEY: Now, the other thing is we give orally notice of appeal, and also file this as our notice of appeal in writing with the Court, and again make the statement that we have been prejudiced by the Court's ruling on manner and means, because we are unable to defend, given the Court's ruling on the present indictment.

THE COURT: Thank you.

(Whereupon an
(off-the-record
(discussion ensued.

* * *